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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF ON BEHALF OF PETITIONERS IN 5 CASES PENDING BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT, MARY ROSE OAKAR, MEMBER OF CONGRESS, AND PATRICIA SCHROEDER, MEMBER OF CONGRESS, AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Margaret Cheeseman, Marie Zagorny, Chong C. Brown, Alan Speek, Irving Saginor, Amalia Meierdiercks, Patricia Schroeder and Mary Rose Oakar, by and through their attorney, Edith U. Fierst, respectfully move this Court pursuant to Rule 42 of the Supreme Court Rules for leave to file a brief *amici curiae* in the above entitled case. Petitioner has consented to allow said filing, but Respondent has declined to consent.

Most of the *Amici* are petitioners in cases pending before the Court of Appeals for the Federal Circuit which have been (or soon will be) stayed pending a decision by the Supreme Court in *Lindahl v. OPM*, 718 F.2d 391 (Fed. Cir. 1983), cert. granted, 52 U.S.L.W. 3906 (U.S. June 18, 1984) (No. 83-5954). The possibility of their

obtaining judicial review of their respective cases may depend upon a favorable ruling by the Court in this case.

The remaining *Amici* are Members of Congress.

The jurisdictional issues presented by movants were not before this Court in *Lindahl* until the Government sought in its reply brief to broaden the issues beyond those decided by the Federal Circuit or raised in Petitioner's brief. Prior to that date, the dispute in *Lindahl* was restricted to the right of an applicant for disability retirement to obtain judicial review by the Court of Appeals for the Federal Circuit of the denial of his claim. Specifically the issue was whether section 8347(c) of title 5 U.S.C. precludes review of any aspect of the denial of such claim, as held by the Federal Circuit, or alternatively whether it bars that Court from reviewing only a decision on the facts of the alleged disability.

The Government's reply brief raised several entirely new questions, including whether judicial review is also barred when the applicant is seeking retirement benefits other than disability benefits, whether review by the Federal Circuit is separately barred when the claimant is a retired Federal employee, whether such review is precluded when the claimant is the surviving spouse of a Federal employee, and whether the proper forum in all such cases is the Claims Court.

These questions are of critical importance to movants whose petition before the Federal Circuit has been stayed, and whose right to be heard on appeal may depend upon the decision of this Court. These movants have been badly prejudiced by the Government's request that this Court rule adversely to them without giving them notice or an opportunity to present their views.

While it is true that this brief *amici curiae* is not timely pursuant to Rule 36 of the Supreme Court rules,

this untimeliness is of Respondent's making.* There was no reason for movants to know they had an interest in the case of Mr. Lindahl until Respondent herein attempted to broaden the issues in its brief, at which time it was already too late to proceed timely under Rule 36.

CONCLUSION

For all the foregoing reasons, I respectfully urge this Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the position of movants.

Respectfully submitted,

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* Respondent neither served nor furnished a copy of its brief to petitioners, thereby causing another week to be lost.

QUESTION PRESENTED

1. Whether the Court of Appeals for the Federal Circuit has jurisdiction over retirement cases, and if so whether this jurisdiction can be invoked on the petition of retired employees or their survivors.

2. Whether the Claims Court is the proper forum for appeals from the Merit Systems Protection Board in retirement cases.

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INTEREST OF AMICI CURIAE

Most of the *Amici* are petitioners in cases pending before the Court of Appeals for the Federal Circuit which have been (or soon will be) stayed pending a decision by the Supreme Court in *Lindahl.* The possibility of their obtaining judicial review of their respective cases may depend upon a favorable ruling by the Court in this case.

The remaining *Amici* are Members of Congress. Mary Rose Oakar is Chair of the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service. Patricia Schroeder is Chair

of the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service. Both are deeply concerned that as a result of this case judicial review may be cut off from members of the Civil Service with respect to their retirement rights. Both see the protection of these rights as vital to the persons and issues with the charge of their respective Subcomittees.

STATEMENT

On October 10, 1984, the Department of Justice filed a motion to stay proceedings in the case of *Cheeseman and Zagorny* (on behalf of themselves and others similarly situated) *v. OPM*, Nos. 08318310675 and DC08318310909 (MSPB June 5, 1984), *appeal docketed* No. 84-1675 (Fed. Cir.) which is pending in the Court of Appeals for the Federal Circuit. It asked for the proceedings to be delayed pending a decision in *Lindahl v. OPM*, 718 F.2d 391 (Fed. Cir. 1983) on which *cert.* had been granted. Shortly thereafter the Justice Department filed similar motions to stay proceedings in three other cases (*Brown v. OPM*, No. 831L8310837 (MSPB July 7, 1984), *appeal docketed* (Fed. Cir.) 84-1743; *Speek v. OPM*, No. SF 08318310957 (MSPB July 6, 1984), and *Saginor v. OPM*, No. DC08318410331 (MSPB July 9, 1984), *appeal docketed*, 84-1743. All of these cases have now been stayed.

At least one additional case now pending in the Federal Circuit will almost certainly be stayed as soon after docketing as feasible. That case is *Amalia Meierdiercks v. OPM*, No. 08318410132 (MSBP Sept. 27, 1984), *appealed but not yet docketed* (Fed. Cir.).

These cases involve the following facts and issues.

1. *Cheeseman and Zagorny v. OPM, supra.* This case arose because OPM failed to change the application for retirement when 5 USC 8339(j) was amended in 1974. Under the previous law, the annuity payable to a retiree who elected a survivor annuity was permanently reduced.

The 1974 amendment (Pub. L. 93-474) provided for the reduction to cease when the marriage terminates by death, divorce or annulment. As the result of litigation which began in 1981, OPM revised its application form, and notified all persons who had retired in the interim and elected less than the maximum survivor annuity, or their survivors, that the retiree had been misinformed and they could change the election, providing they could show that the misinformation was a primary cause of retiree's decision not to provide a survivor annuity. So far over 1400 individuals have made such a showing to the satisfaction of OPM, and been assured either that their spouses will be protected after the death of the retiree, or if that death has already occurred, that they are eligible to receive survivor annuities (including back payments to the date of death of the retiree). The remaining issues are (1) whether the MSPB was right in putting the burden of proving that a deceased employee was primarily influenced by the application form's misinformation on the employee's widow(er), or should have put it on the Government to prove that he or she was not so influenced; and (2) whether the MSPB was right in holding that it lacks authority to award an attorney's fee in this case because it lacks such authority in disability retirement cases.

2. *Saginor v. OPM, supra.* This case was filed on behalf of a retired employee who tried to change his survivor annuity election as part of the *Cheeseman and Zagorny* class. His application was refused, apparently because he was not married when he filled out the application form with the misleading information, although he was contemplating the marriage which occurred shortly thereafter. The issue is whether he has a right to show that he was primarily influenced by the application form's misinformation when he failed to make a timely election to provide a survivor annuity for his wife.

3. In *Speek v. OPM, supra*, a retired employee who was divorced and remarried seeks to assure survivor protection for his second wife. OPM was required to notify him of a change in the law making his provision of a survivor annuity for his second wife contingent upon his requesting such coverage within one year of that marriage. Mr. Speek denies that he received the required notice. During the period before he notified the Government of the remarriage, Mr. Speek's annuity continued to be reduced to pay for a survivor annuity. The question is whether the holding of the Merit Systems Protection Board that Mr. Speeks received timely notice of the change in the law was unsupported by the evidence and therefore that its refusal to allow him to elect a survivor annuity for his wife was arbitrary and capricious under the circumstances.

4. In *Brown v. OPM, supra*, the Civilian Personnel Office in Korea denied a retired employee the opportunity to elect a survivor annuity for the wife he married after retirement, stating that he was ineligible until he had been married two years. The employee lived in Seoul and had previously worked there for the Defense Department. There is evidence that the employee of the Civilian Personnel Office who refused his application was relying on outdated issuances of OPM. Before he died, the retired employee learned that he had been misled and that in fact it was necessary for him to make the election within one year. He tried to rectify the error, but his application was rejected as not timely because more than a year had elapsed. The petitioner is the widow on whose behalf he tried to obtain a survivor annuity. The question is whether the MSPB was right in holding that although the Government provided wrong information to its retired employee on which he had no alternative but to rely, it can nevertheless deny him and his surviving spouse the benefits which they have would have obtained absent the Government's wrongful conduct.

5. In *Meierdiercks v. OPM, supra,* the application of the surviving widow of a retired employee who is part of the *Cheeseman, Zagorny* class was denied on the ground that the burden of proof is on her to show that the primary cause of her husband's election was the misinformation on the application form. There are two issues, (1) whether the burden of proof is properly on Mrs. Meierdiercks: and (2) whether the MSPB was correct in failing to review the merits of her claim that she had met the burden.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below held that it lacked jurisdiction to review a decision of the Merit Systems Protection Board (MSPB) regarding a disability retirement, both the fact of the alleged disability and the standards followed by the MSPB in reaching its decision. In its reply brief Respondent argued that the above Federal Circuit coverage is unavailable not only with respect to disability retirements, but also with respect to retirement based on age and service. It further argued that the Federal Circuit has no jurisdiction to hear appeals brought by persons who have retired and are, therefore, no longer employed by the Federal Government, or by their surviving spouses because they are not and never were employees. Finally Respondent argued that the proper forum for appeals on these issues by these persons is the Claims Court.

The Respondent's brief is wrong because the special prohibitions placed on disability retirement do not apply to retirement for age and service. A decision to exclude age and service retirements from appellate review by the Federal Circuit would affect many more persons than would one regarding disability retirement, and would wreak havoc on the administration of justice. Such a decision should not be treated as an incidental concomitant of the law on disability retirement.

Specific statutory authority gives the Federal Circuit jurisdiction to hear retirement cases based on age and service. 5 U.S.C. 7701(a)(1) gives the MSPB express authority to hear cases that are appealable under any rule or regulation. MSPB regulations (5 CFR 1201.3 (a)(6)) provide authority for the MSPB to hear retirement cases. Section 7703(a)(1) authorizes the Federal Circuit to hear appeals from anyone adversely affected by an MSPB decision. Arguments for a contrary result are based on arcane readings of the statute and legislative history; they are unreasonable.

The same unreasonableness is true of arguments based upon the presumed intention of Congress to treat voluntary retirements differently from involuntary; frequently it is unclear whether a particular retirement is voluntary or unvoluntary. In the case of the surviving spouse of an employee who dies in service, there is no basis for assuming voluntariness (unless the employee committed suicide.) Moreover, despite the Government's argument that Congress deemed it inappropriate for the Federal Circuit to hear retirement claims because they are not in the nature of adverse actions, many retirement claims, including those of all movants who are petitioners in the Federal Circuit, involve actions initiated by the Government adverse to petitioners.

The Federal Circuit in *Bronger v. OPM*, Appeal Nos. 1349, 1350, 1376, slip op. (Fed. Cir. July 26, 1984) held that an employee does not lose entitlement to appeal because he has retired. This decision is correct, and should be sustained.

Similarly a survivor has the right to appeal: Section 12-101 of the D.C. Code provides that the right of action of a retired employee survives his death. Both statutory and case law substantiate the claim of the surviving spouse to be the legal representative.

The Claims Court cannot be deemed a substitute forum. Its jurisdiction is not appellate, but trial. To give it jurisdiction over retirement cases would thwart the Congressional policy of fostering uniform treatment of similar situations. Great harm not intended by Congress would be done to many potential appellants from decisions of the MSPB if recourse to the Claims Court were the only forum where they could obtain a hearing.

ARGUMENT

I. Retirement for Age and Service Is Very Different From Disability Retirement.

Petitioners in cases stayed by the Federal Circuit are seeking retirement or survivor annuities based on age and service, not disability.

Disability retirement is very different from ordinary retirement at the appropriate age and after the required service. This difference exists both as to eligibility requirements and under the jurisdictional provisions of title 5 of the United States Code.

First as to eligibility requirements: Entitlement to disability retirement depends upon a showing that the applicant is disabled. Someone must weigh the evidence and make this decision. Congress has vested that authority in the Office of Personnel Management (OPM) and the MSPB. The burden of proving disability has been placed upon the applicant who is seeking this special benefit. (*Chavez v. OPM*, 6 MSPB 343, 1981).

By contrast, retirement for age and service is a matter of right. No discretion needs to be exercised by anyone. The only issue is one of bookkeeping: does the applicant indeed have the requisite age and service? If the answer is that he or she does, the burden must be on the Government if it seeks to withhold such payments to explain why.

The jurisdictional provisions of title 5 take account of the difference in the two types of benefits by providing in pertinent part in section 8347(c).[1] "The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive, and are not subject to review."

The exact meaning of that provision is in controversy in the *Lindahl* case. It is beyond dispute, however, that the quoted language has no direct bearing on cases where a question of disability or dependency[2] does not exist.

II. Coverage of Retirement Cases Involves Serious Questions of Access to and Administration of Justice.

The right to appeal with respect to retirement involves many more individuals than does a decision on jurisdiction over disability. This issue should not be treated as an appendage of disability retirement, which occurs far less frequently.

The ramifications of a decision denying appellate rights in retirement cases would be broad beyond imagination. The potential variety of cases is as great as life itself.

Petitioners on this amicus brief have a diversity of situations requiring judicial review. Beyond doubt there is a multitude of other such issues involving many other petitioners, and potential petitioners.

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[1] All section references are to title 5 U.S.C. unless otherwise indicated.

[2] For purposes of this statute, dependency appears to mean an inability to be self-supporting. There is no indication that it refers to the status of a homemaking wife as the dependent of an employee. Payment of a survivor annuity to a widow or widower is not at all contingent upon a showing that the widow(er) was dependent upon the employee.

Recourse, and clarity about the method of obtaining such recourse, are needed. The difficulty of drawing the line to deny access to judicial review to some petitioners, and provide it to others, can be demonstrated by the issue of whether to hear active employees who have questions regarding retirement rights. Could they appeal?

If active employees can be heard by the Federal Circuit, but retirees who seek to raise the identical legal issue cannot be heard, the likelihood of a double standard of justice and consequent great confusion looms large.

The same result would follow from the Government's proposed denial of jurisdiction over any retirement issue, no matter by whom raised (Brief of Respondent, 24), because of the interrelationship between retirement rights and other employee rights and benefits. For example, the definition of service raised in the *Bronger* case (Slip op. at 12-15) may have other applications. The law regarding labor-management relations permits collective bargaining about conditions of employment, presumably including some retirement issues. (5 U.S.C. § 7103) An adverse action can lead to a reduction in retirement pay (Section 7512). Health benefits are available to annuitants on a basis similar to that applicable to employees (Section 8905). No doubt there are numerous other examples. The Government's position would create uncertainty about the forum where these issues will be decided, and the probability that the decisions of different forums will not be uniform.

The extent to which the Government's arguments lead into unexpected and perilous ground can be illustrated by the decision of the MSPB in *Cheeseman and Zagorny v. OPM*, *supra* that it lacks jurisdiction to award attorney's fees in retirement cases, although these are authorized under section 7701(g)(1). If this ruling is allowed to stand, it will deprive many widows of legal

assistance they cannot afford to purchase. In the *Cheeseman* class action, for example, many class members are widows without other retirement income (Federal employment until recently provided no coverage under Social Security). Many live on SSI. Nothing in the legislative history has been cited to suggest that Congress intended their cases to be conducted at their own expense or not at all. It is hard to believe that Congress intended to exclude this class of needy plaintiffs from the protection of section 7701(g)(1) which authorizes the Board to provide payment of reasonable attorney fees to the prevailing party if "warranted in the interest of justice." But such an outcome appears to the Merit Systems Protection Board to be the consequence of the Government's position.[3]

III. The Federal Circuit has Jurisdiction to Hear Cases Involving Claims for Non-Disability Retirement.

The statutory language makes the conclusion inescapable that Congress intended the Federal Circuit to have jurisdiction over retirement cases that do not involve disability or dependency.

Specifically section 7701(a)(1) provides that "an employee or applicant for employment may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board *under any law, rule or regulation.*" (Emphasis supplied).

MSPB regulation section 1201.3(a)(5) of 5 CFR (initially published at 44 FR 38349, June 29, 1979) provides that the Board's appellate jurisdiction includes "Determinations relating to disability retirement, health insurance and annuities."

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[3] Presumably the Government would have the MSPB make the same decision regarding the surviving children of Government employees, making this case one of the most egregious assaults on widows and orphans since the days of the Robber Barons.

Under section 7703(a)(1), because the Board has this jurisdiction, so does the Court. That section of the statute provides that an employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

A. *The physical disability exception has no relevance to non-disability retirement.*

Excepted from the jurisdiction of the Federal Circuit by section 8347(d) are "questions of disability and dependency", other than those involving mental disability. The holding of the *Lindahl* court was that section 8347 (c) should be construed to exclude from the jurisdiction of the Federal Circuit all aspects of physical disability retirement, not only findings of fact regarding the claimants' disability. This interpretation is properly before the Supreme Court. (Brief of Petitioner and of Respondent, as well as several *amici*).

In addition, however, the Government argues that the statute should be construed to preclude jurisdiction in the Federal Circuit over all types of retirement, not only disability retirement. (B. of Resp. 20, 21). This conclusion does not follow from the statutory language.

B. *The Government's Argument is at Variance with Common Sense.*

The Government's argument is long, complicated by arcane constructions, and heavy with legislative history, but it ignores the plain words of the relevant statutes, and the reliance that Members of Congress, in the rush of their multitudinous duties, are likely to place on the simple meaning, rather than the strained and complex construction that only a legal scholar can follow.

For example, the Government argues that because the exception in section 8347(d)(2) to the bar against review of questions of disability or dependency in 8347(c)

authorizes judicial appeal on a finding of mental disability, there is an implication that no other retirement question can be appealed.[4] This reading ignores the ordinary meaning of the words involved, and flies directly in the face of the language of section 7703 which provides that any action appealable to the Board may be appealed to the Federal Circuit.

The common understanding is that the Board is authorized to hear appeals on retirement cases. This was true prior to enactment of section 8347(d)(2) in 1980, and remains true today. Numerous cases have been heard by the Board under that authority, including the various cases brought by the petitioners.

To the extent that the Government's argument is based upon the wording of a 1980 Congressional Act to provide coverage for mental disability cases, it suggests that Congress intended thereby to eliminate appellate review for a very large class of Federal employees without debating this intent. This argument lacks reasonableness. Members of Congress must be assumed to have given the normal reading to the proposal before them, which was merely to authorize review of a factual determination that an employee (including one who has retired from the Federal service) suffers from a mental condition. If Congress had decided in 1980 to eliminate the right to appellate review for a large class of Federal employees, Congress would have written in plain English that this change had taken place.

C. *Voluntariness is not a workable criterion for appellate review.*

Advocates of the Government's position argue that its view is sensible because Congress wanted to distinguish between voluntary and involuntary claims for retire-

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[4] Brief of Respondent, 20 and 21.

ment.[5] This line of reasoning cannot withstand analysis. Who knows what the dynamics of a particular situation are with sufficient clarity to determine before hearing the facts whether the retirement was voluntary or involuntary? Many persons are forced into retirement each year because their jobs are abolished or because they know that if they do not retire they will be discharged. Many others choose retirement in lieu of accepting downgrading or transfer across the country. Are these retirements voluntary or involuntary? A decision to classify a retirement improperly risks unequal treatment of similarly situated persons.

Moreover even if all retirements were presumed to be voluntary, it would be completely unreasonable to make a presumption of voluntariness about death in service (other than the occasional suicide). There are many thousands of such cases; the law is clear that the surviving spouse is entitled to a benefit provided certain threshold standards are met.[6] Is the widow(er) to be deprived of a right to appeal to the court because some applicants for disability retirement act voluntarily?

The arguments made by some of those who would deprive petitioners of the right to appeal to the Federal Circuit ignore the statutory words "disability and dependency" in section 8347(c). See, for example, the decision of the MSPB in *Cheeseman and Zagorny v. OPM*, *supra*, in which the Board cited an earlier Federal Circuit case, *Williams v. OPM*, 718 F.2d 1553 (Fed. Cir. 1983) as authority for denying attorney fees in a non-disability case. The Board explained that although the *Williams* case "relates specifically to physical disability retirement appeals, appellants have pointed to nothing

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[5] See, for example, Judge Nies' dissent to *Bronger*, Slip op. at 3 and 4, or the conceptually similar argument made by Respondent (Brief, 40) regarding appeals closely resembling adverse actions, discussed *infra* pp. 14 and 15).

[6] 5 U.S.C. 8341.

which would render this analysis inapplicable to cases involving other retirement issues, and we have not found any appropriate distinctions." *Cheeseman, supra* at page 11. To the same effect is the reasoning of Judge Nies in her dissent to *Gilman v. OPM*, No. 84-764, slip op. (Fed. Cir. Sept. 12, 1984) where she says "In my view, a decision by the MSPB on a claim for benefits under section 8347(d)(1) is not reviewable by this court unless the claim comes within section 8347(d)(2) [relating to mental disability]".

IV. A Retired Employee is an Employee for Purposes of Sections 7701(a)(1) and 7703(a)(1).

Despite the statutory language specifying that an appeal must be brought by "an employee or applicant for employment," the Federal Circuit has already decided, properly, in *Bronger v. OPM*, Appeal Nos. 83-1349, 1350, 1376, slip op. (Fed. Cir. July 26, 1984) that an employee does not lose entitlement to appeal when he or she retires. The reasons stated by the court in its opinion are reasonable and correct.

In particular the *Bronger* court pointed out that cases involving adverse actions are sometimes brought by persons who are no longer employees as a consequence of the very adverse action that is challenged. The court noted that an interpretation that limited the court's jurisdiction to current employees would deprive it of a major portion of the jurisdiction which it exercises every day. *Id.* at 10 and 11. The Government doesn't like this idea, and tried to show that it is illogical by stating that an individual doesn't lose his right of appeal if he is deprived of status as an employee while seeking review of the adverse action. (Brief of Respondent, 24). But what about an individual who doesn't file until he has been terminated? The brief is silent.

The logic of the Government's position is that such a former employee would have no right to appeal to the Federal Circuit. If this were the rule, the race to the

lawyer's office would begin the minute any employee had reason to think he might be fired. Conversely, the Supervisor would be under pressure to hasten to discharge anyone whose appeal he feared. It would be nonsensical to suppose Congress wanted such a system.

Moreover, if the Court issues a jurisdictional ruling requiring such a bifurcation of authority over discharge cases, the Congressional purpose of achieving a system that will provide "quick and definitive answers to legal questions of nationwide significance" (S. Rep. 97-275, 97th Cong., 1st Sess., 1981, [hereinafter cited as Senate Report], p. 13.) will be thwarted.

The Government assumes wrongly that retirement cases do not involve events closely resembling adverse actions. (Brief of Respondent, 40). In fact all of the petitioners' cases and *Bronger, supra*, involve actions adverse to petitioners which were initiated by the Government. In the *Cheeseman and Zagorny* class action, that adverse action was the use of an application form for retirees which misled them into electing not to provide a survivor annuity. The application form also is the underlying factor in *Saginor* and *Meierdiercks*. In both *Bronger* and *Brown* the adverse action consisted of a Government official giving wrong information to a former employee regarding his employment rights, which led the former employee to act to his detriment. In *Speek* the adverse action was the failure of the Government to give Speek notice that he could not rely on the law as it was when he retired, but must provide OPM notice of his new marriage.

A more reasonable interpretation of Congressional intent is that the reference to an employee or applicant for employment was intended to describe generally what the relevant chapters of title 5 cover. These are rights of employees and applicants for employment, not the rights of the general public with respect to contracts, torts, the environment, criminal law, foreign policy, and

so forth. None of these other matters can be brought before the MSPB, and if they come before the Federal Circuit, it is because there is separate authority. But issues relating to the rights of employees, including retired employees, are covered by title 5 U.S.C., and such matters may be heard by the Board and on appeal from it by the Federal Circuit.

V. The Right of Action of a Retired Employee Survives His or Her Death, and the Surviving Spouse is Entitled to be Heard on Appeal.

The right of action to obtain a survivor annuity survives the death of the retired employee. The right of appeal of an employee under Section 7703 survives his or her death.

Section 12-101 of the D.C. Code provides:

> On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.

This statute governs an action against the Office of Personnel Management which is located in the District of Columbia. Further "the District of Columbia law of survival of action was enacted by Congress pursuant to its constitutional power and responsibility to exercise exclusive legislation in all Cases whatsoever over . . . the Seat of Government of the United States'. U.S. Const. Art. I, sec 8, cl. 17," as cited by Judge Louis Oberdorfer in *In Re Air Crash Disaster Near Saigon, Etc.* (476 F. Supp. 521, 527 (D.C. 1979).

The term "legal representative" in Section 12-101 of the D.C. Code is not limited to a duly appointed executor or administrator but includes "any person who, whether by virtue of testamentary act or operation of law, stands in the place of the decedent with respect to his property . . ." *Strother v. District of Columbia* 372 A2d 1291,

1296 (D.C. App. 1977). It is plain that the surviving spouse would qualify under the D.C. statute and could bring this appeal.

While not all the claimants in petitioners' cases are located in the District of Columbia, many are. It is inconceivable that Congress intended to have the right of appeal vary according to the jurisdiction in which the claimant resides. Instead there must be a uniform rule of law.

Judge Oberdorfer has provided another reason why the law of the District of Columbia is the appropriate one:

> Because of the national interests at stake here, the law of the forum, which is the law enacted by Congress for the Seat of the Government, should be displaced only if some other jurisdiction has an overwhelming policy interest in applying its own law. See *In re Paris Air Crash*, 399 F. Supp. 732, 745 (C.D. Calif. 1975). *Id.* at 527.

The surviving spouse not only inherits the right but also clearly could be substituted in this action and appeal. Section 12-102 of the D.C. Code makes the Federal Rules of Civil Procedure applicable to determining the substitution of parties in civil actions in the District. Under Rule 25 of the Federal rules, the court may allow substitution. In cases where the party in interest is the surviving spouse, there seems little doubt that the court would recognize the widow(er) as the substitute party. Indeed by entertaining appeals from surviving spouses, the MSPB has already done so.

VI. The Claims Court is not an Alternative Forum.

The Government's brief contained the following statement in footnote 15:

> We concede that the Claims Court does have jurisdiction to review the MSPB's decision in a retirement case in a suit under the Tucker Act (except as barred by 5 U.S.C. 8347)

The statement is offered as part of the Government's challenge to the Federal Circuit's reasoning in *Bronger supra*, that there is a presumption in favor of judicial review.

Without some statutory basis, however, the Claims Court may refuse to act upon the Justice Department concession that it has jurisdiction to hear appeals in retirement cases.

A. *There is no Statutory Basis for Appellate Review in the Claims Court.*

All appellate jurisdiction over the Merit Systems Protection Board is vested in the Court of Appeals for the Federal Circuit.[7] The Claims Court is a trial court only. The Tucker Act[8] cited by the Government in its brief does not provide a right of appeal, but rather a right of action in the first instance.[9]

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[7] Section 7703(b)(1) of 5 U.S.C., as amended in 1982 by the Federal Courts Improvement Act (Pub. L. 97-164), provides that a petition to review a final order or final decision of the Merit Systems Protection Board shall be filed in the United States Court of Appeals for the Federal Circuit.

The basis for this statutory language is section 1295 of Federal Courts Improvement Act which gives the Court of Appeals for the Federal Circuit *exclusive* jurisdiction to hear an appeal from the Merit Systems Protection Board pursuant to sections 7703 (b)(1) and 7703(d). The other section, 7703(d), relates to the circumstances under which the Director of the Office of Personnel Management is authorized to seek review of a final order of the MSPB in the Federal Circuit. Neither of these two sections cited in the Federal Court Improvements Act provides for appeals to the Claims Court.

[8] 28 U.S.C. § 1346(a)(2), § 1491(a)(1) (1982).

[9] At an earlier phase of *Cheeseman and Zagorny v. OPM, supra* the District Court for the District of Columbia refused on motion from the same Justice Department that now urges the District Court as the proper forum to hear petitioners arguments that they had been misled by the retirement application form and were therefore entitled to provide or receive survivor benefits on the ground that there had been no exhaustion of administrative remedies,

The legislative history of the Federal Courts Improvement Act is to the same effect.[10] Finding trial jurisdic-

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AFGE v. Devine, No. 82-3391, slip op. (D.C. 1983) at 7-9, thereby showing that the Justice Department then shared the common understanding that the procedures of the Merit Systems Protection Board were mandatorily applicable.

Specifically the Court said:

> With regard to defendant's motion to dismiss, the Court has accepted plaintiffs' allegations as true and has drawn all reasonable inferences in a light favorable to the plaintiffs as it must on a motion to dismiss. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Court, however, cannot avoid the fact that a decision by the Court on claims that have not yet been reviewed administratively on a class-wide or an individual basis would violate the administrative procedure outlined in 5 U.S.C. Sec. 8347.
>
> The Merit Systems Protection Board is by statute authorized to decide appeals from decisions on applications for reconsideration. It has already actually considered an appeal on the remaining principal issue in this case by a retiree who claimed he had been misinformed by the BRI Form 46-370. *Doyle v. Office of Personnel Management*, DC 08318110491 (July 30, 1981). The MSPB can, as well, consider the adequacy of those forms as they are challenged in the context of this suit. Indeed the plaintiff in *Devine I* specifically reserved the right to file a class action with the MSPB.
>
> Plaintiffs allege that the Board's backlog will prevent a timely determination of the rights of retirees, some of whom are quite aged and infirm. While the facts of this case clearly illustrate the troubling effects of following an administrative procedure and the risk in its inherent delay, it does not follow that the requirement of exhausting those administrative remedies should be discharged or avoided. The administrative process must be completed before judicial review is appropriate.

[10] The Senate Report states that the Federal Circuit "inherits, in *appellate form*, substantially all of the jurisdiction of the two courts abolished in the merger" (Emphasis supplied). Senate Report, p. 3. (The two courts are the Court of Claims and the Court of Customs and Patent Appeals). Later it stated that "the Claims Court inherits substantially all the *trial jurisdiction* of the Court of Claims which under present practice is exercised largely by the

tion in the Claims Court would mean *de novo* hearings without regard to prior proceedings in the MSPB, a redundant and unnecessary procedure.

The Justice Department does not say why it believes there is a right of review in the Claims Court over decisions of the Merit Systems Protection Board, or why it conceded that authority (other than the hope of defeating any right of appeal in the Federal Circuit).

B. *Congress had No Reason to Give Appellate Jurisdiction to the Claims Court.*

It would be out of keeping with the stated intention of Congress in enacting the Federal Courts Improvement Act to give appellate jurisdiction over retirement cases to the Claims Court.

Specifically the Senate Report to that statute states that the new court is designed to "provide reasonably quick and definitive answers to legal questions of nationwide significance." The report further states that because all appeals will be to the Federal Circuit, the Federal judicial system will avoid the uneven application of the law when faced with the facts of individual cases. Senate Report *supra* at 3.

This purpose would be thwarted if matters involving retirees or survivors went to the Claims Court, while other cases based on the same facts but brought by a person who had been discharged, went directly from the MSPB to the Federal Circuit.

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commissioners of that court." (Emphasis supplied). Senate Report, pp. 7 and 8. No mention is made in that discussion of appellate jurisdiction.

Further in describing the expected caseload of the new Federal Circuit, the Committee noted that the case load of the Article III judges on the old Court of Claims are the ones to consider (not that of the commissioners). No indication is given that Congress expected this caseload to be reduced because appellate cases involving retirement would be removed from the court's jurisdiction and heard instead by the Claims Court. (Senate report, p. 7.)

C. *There Would Be Serious Negative Consequence if the Claims Court were Found to Be the Proper Forum.*

If the Supreme Court finds the Claims Court is the proper forum and there is no jurisdiction in the Federal Circuit to hear appeals from the MSPB, great confusion will reign. It may be too late for some cases now on appeal to the Federal Circuit to be transferred to the Claims Court. The proper interpretation of the six year time limit will raise new questions about the event from which the six year time limit must be judged (e.g. the date of the employee's retirement, the date of his death where the claimant is a survivor, the date on which the employee was wronged). Forum shopping will re-emerge as the public tries to decide whether to initiate a case before the Claims Court or to go first to the MSPB and then seek de novo review at the Claims Court. Decisions will not be uniform, unless they are routinely appealed to the Federal Circuit from the Claims Court.

All of the difficulties outlined above which would flow from sending retirement cases to the Claims Court can be avoided by deciding that the Congress acted in accordance with (1) the language of the statute which provides for appeals to the Federal Circuit Court except when issues of disability and dependency are at stake, and (2) the purpose expressed in the legislative history of bringing about uniformity in decision on Federal employment rights.

CONCLUSION

It would do great harm never intended by Congress to petitioners and untold others to construe the law as the Government argues. Instead, the Court should find that a right of appeal to the Federal Circuit has been provided by Congress in retirement cases, and that such appeal may be filed by retirees or their survivors.

Respectfully submitted,

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